STATE OF MICHIGAN

COURT OF APPEALS

PHOENIX INVESTMENT HOLDING COMPANY, INC., WOODLAND EXCAVATING, L.L.C., and WILLACKER HOMES, INC.,

Plaintiffs-Appellants,

v

NOSAN & SILVERMAN HOMES, L.L.C., SILVERMAN DEVELOPMENT COMPANY, SILVERMAN HOMES, INC., SILVERMAN CONSTRUCTION CO. and TOLL BROTHERS, INC.,

Defendants-Appellees.

UNPUBLISHED
April 20, 2004

No. 246398
Oakland Circuit Court
LC No. 01-035158-CK

Before: Talbot, P.J., Neff and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court orders granting defendants' motions for summary disposition. We affirm in part and reverse in part.

The parties were involved in a condominium land development project that was to be completed in three phases (Phase I, Phase II and Phase III). The development project originally began in December 1995 and continued up to the time that plaintiffs filed a complaint in October 2001. In the course of the development project, the parties executed multiple agreements, one of which included a merger and integration clause ("1997 Option Agreement"), followed by a "First Amendment" in June 1998, and a "Second Amendment", in August 1999, which amended the 1997 Option Agreement. The parties also executed an excavation contract ("1996 Excavation Contract"), as well as an addendum to the excavation contract.

We review a trial court's grant or denial of summary disposition de novo. *First Public Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). The proper interpretation of a contract, which is a question is law, is also reviewed de novo. *Id*. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2004), citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings,

affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Sherpard, supra,* 259 Mich App 324, citing *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *UAW-GM Human Resource Center v KSL Recreation Corporation*, 228 Mich App 486, 491; 579 NW2d 411 (1998), citing *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n 28; 517 NW2d 19 (1994). "Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided." *UAW-GM Human Resource Center, supra*, 228 Mich App 491-492. If the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties. *Id.*, 492. A contract is ambiguous if its words may reasonably be understood in different ways. *Rasheed, supra,* 445 Mich 128.

> When there are several agreements relating to the same subject matter, the intention of the parties must be gleaned from all the agreements. If parties to a prior agreement enter into a subsequent contract that completely covers the same subject, but the second agreement contains terms that are inconsistent with those of the prior agreement, and the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement. [*Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 346-347; 561 NW2d 138 (1997). [Citations omitted.]

Plaintiffs argue on appeal that the default remedy provision in the 1997 Option Agreement did not provide the sole remedy available to them. The default remedy provision in the 1997 Option Agreement provided, in pertinent part:

> 11. **Default**: Failure of Purchaser to (a) exercise *an Option* with respect to *a Site* in the manner provided in this Agreement within (10) days after Seller has notified Purchaser that Purchaser has failed to exercise *an Option* as is required . . . shall extinguish Purchaser's right to *all Sites* not theretofore purchased *and* Purchaser's option in Phase 3 Property . . . and all payments made hereunder shall be retained by and be the property of Seller as liquidated damages . . . . [Emphasis added.]

Under the plain language of the default remedy provision, defendants' failure to exercise *any* option triggered plaintiffs' right to retain all payments and extinguish defendants' rights to *any* remaining unoptioned sites, and not just those sites located in Phase III, contrary to plaintiff's assertion. Therefore, to the extent that plaintiffs assert that the default remedy provision in the 1997 Option Agreement only applied to Phase III units, plaintiffs are not entitled to appellate relief.

Plaintiffs contend that their available remedies were modified by the First and Second Amendments, as defendants' obligation to exercise the options/pay the options fee became an "affirmative obligation." Again, we disagree. First, plaintiffs assert that their available remedies increased after the First Amendment. Plaintiffs rely on Paragraph 4 of the First Amendment, which provided, in pertinent part:

> *Until (and including) September 1, 1998*, the following shall be substituted in its entirety for Paragraph 38: By signing below, and provided that the Phase IIB Sites are "ready for sale" . . . . on or before *September 1, 1998*, Purchaser guarantees the payment of the options fee of $5,750 per site for Phase IIB Sites. In the event of default in such payment, Seller shall be entitled to all damages as a result of such default, including but not limited to attorney's fees and all collection costs. [Emphasis added.]

Here, the plain language of the provision provides that it was only effective "until (and including)" September 1, 1998, before the original provision, Paragraph 38, was reinstated. Therefore, because plaintiffs' complaint alleged that defendants failed to exercise their options to purchase five lots in Phase II on or around October 20, 2000, we find that plaintiffs' right to "all damages as a result of such default, including but not limited to attorney's fees and all collection costs" was extinguished more than two years earlier, on September 2, 1998.

Similarly, the Second Amendment did not increase plaintiffs' additional remedies. Plaintiffs fail to cite any provision in the Second Amendment that either (1) reinstated Paragraph 4 from the First Amendment, (2) extended the period for defendants to pay the options fee of $5,750 per site for Phase IIB Sites, or (3) provided another remedy if defendants failed to exercise the options. Indeed, Paragraph 6 of the Second Amendment provided:

> 6. Except as amended by this Second Amendment, and subject to the terms and conditions of this Second Amendment, the [1997] Options Agreement, as amended, is hereby ratified and confirmed.

As such, the default remedy provision remained the controlling provision because the 1997 Option Agreement, the First Amendment and Second Amendments constitute a series of agreements. *Omnicom of Michigan, supra*, 221 Mich App 346-347.

Next, plaintiffs argue that the trial court improperly concluded that their remedy was limited to liquidated damages, although the Second Amendment provided that defendant Toll Brothers had a contractual obligation to guaranty the acquisition of the remaining Phase II lots. The Second Amendment provided, with respect to defendant Toll Brothers' guaranty:

> F. Toll Brothers hereby agrees to guaranty the obligations of Silverman with regard to the acquisition of the remaining Phase II Units, in accordance with the terms and conditions of the Options Agreement, as amended.

We conclude that the trial court erred in applying the default remedy provision to defendant Toll Brothers' failure to guaranty. The plain language of the default remedy provision applies only to the *Purchaser's* failure to exercise the options, and not the *Guarantor's* failure to provide a guaranty. Indeed, Paragraph F of the Second Amendment and the 1997 Option Agreement were silent regarding a breach of the guaranty provision after defendant Toll Brothers became the guarantor. Therefore, we conclude that a question of material fact remained regarding plaintiffs' right to separate damages for defendant Toll Brothers' failure to guaranty, and that the trial court improperly concluded that the liquidated damages provision was the appropriate remedy for the failure to guaranty. As such, the trial court improperly granted summary disposition on Count IV of plaintiffs' complaint. *UAW-GM Human Resource Center, supra*, 228 Mich App 491-492.

Next, plaintiffs assert that the trial court improperly concluded that Paragraph 5 of the Second Amendment was an unenforceable "agreement to agree" because a critical term, the price of the excavation work to be performed by plaintiffs, was missing. A contract to make a subsequent contract is not per se unenforceable, and may be just as valid as any other contract. *Heritage v Wilson*, 170 Mich App 812, 819; 428 NW2d 784 (1988), citing *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982). "To be enforceable, a contract to enter into a future contract must specify all its material and essential terms and leave none to be agreed upon as the result of future negotiations." *Heritage, supra,* 170 Mich App 819, citing *Socony-Vacuum Oil Co v Waldo*, 289 Mich 316, 323-324; 286 NW 630 (1939).

Paragraph 5 ("Agreement to Excavate Clause") in the Second Amendment provided:

> 5. Silverman agrees to enter into an excavation contract with Seller for basement excavations, installation of sewer and water leads, back fill, rough and finish grading and trucking of soils for all sites in Phase III of the Trotters Pointe Condominium, subject to mutual agreement of Seller and Purchaser on pricing (which pricing shall be competitive and customary for such work).

The trial court's findings do not provide enough information to permit our review of this issue. The parties had already negotiated pricing (as reflected in the 1998 attachment to the 1996 Excavation Contract), and had partially performed the excavation agreement as to Phase II. The trial court did not address why the parties' previously agreed pricing structure, coupled with their pattern of performance, did not rise to a question of fact regarding the agreement on pricing for Phase III. Thus, while we reverse the grant of summary disposition as to Count II, the trial court may revisit this issue as to the Phase III excavation contract on remand.

Next, plaintiffs assert that the trial court improperly concluded that the "Agreement to Excavate Clause" in the Second Amendment superseded the "Agreement to Excavate Clause" in the 1997 Option Agreement, and that plaintiffs' did not have a claim regarding their inability to finish the excavation work for the remaining Phase II sites. We agree.

The documentary evidence established that before the parties executed the Second Amendment, they were operating under the terms of the (1) 1997 Option Agreement, (2) the First Amendment, and (3) the 1998 attachment to the Excavation Contract that included the pricing structure for the excavation work. Specifically, the 1997 Option Agreement provided, in pertinent part:

> 5. **Seller's Work**: Purchaser [Defendants] agrees to enter into an excavation contract with Seller [Plaintiffs] (or Seller's designee) for basement excavations, installation of sewer and water leads, backfill rough and finish grading and trucking of soils for *all Sites in the Condominium*, subject to mutual agreement of Seller and Purchaser on pricing (which shall be competitive and customary for such work*)*.

The parties subsequently executed the First Amendment, which did not alter Paragraph 5. However, in 1998, after the First Amendment was drafted, the parties added a pricing structure to the 1996 Excavation Contract. Therefore, the 1998 pricing structure was in effect immediately before the parties executed the Second Amendment. *Omnicom of Michigan, supra*, 221 Mich App 346-347. Documentary evidence established that plaintiffs performed excavation work

under the prior pricing structure when they excavated all the sites in Phase I, and all but forty building sites in Phase II. "Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction is entitled to great, if not controlling, weight in determining its proper interpretation." *Detroit Greyhound Employees Federal Credit Union v Aetna Life Ins Co*, 381 Mich 683, 686 n 1; 167 NW2d 274 (1969).

In light of the parties' performance under the 1996 and 1998 agreements, we are persuaded that Paragraph 5 in the Second Amendment, which identified Phase III specifically, did not modify the separate excavation agreements because the Second Amendment also ratified and confirmed the parties' existing arrangements as to Phase II. Specifically, the Second Amendment provided, in pertinent part:

> B. The parties hereto ratify and confirm the existence and continuing validity of the [1997] Options Agreement with *respect to the Phase II Units* in accordance with the terms and conditions of the [1997] Options Agreement, as amended. [Emphasis added.]

Therefore, the trial court erred in concluding that Paragraph 5 in the Second Amendment superseded Paragraph 5 in the 1997 Option Agreement with respect to Phase II units. As such, an issue of material fact remained regarding Count II of plaintiffs' complaint with respect to Phase II lots. *Detroit Greyhound Employees Federal Credit Union, supra,* 381 Mich 686; *Omnicom of Michigan, supra,* 221 Mich App 346-347.

Finally, plaintiffs assert that the trial court improperly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) on plaintiffs' claim regarding a breach of the excavation contract. Plaintiffs argue that the merger and integration clause in the 1997 Option agreement did not preclude them from seeking damages for a breach of the Excavation Contract. We note that, although defendants' motion was based on MCR 2.116(C)(8), the trial court reviewed matters outside the pleadings; therefore, this Court analyzes the motion under MCR 2.116(C)(10). *Spiek, supra,* 456 Mich 338.

An integration clause generally nullifies all previous agreements. *Archambo v Lawyers Title Insurance Corp*, 466 Mich 402, 413; 646 NW2d 170 (2002), citing *UAW-GM Human Resource Center, supra,* 228 Mich App 491. Here, the trial court concluded that plaintiffs were only entitled to liquidated damages for any breach of the excavation contract because the merger and integration clause superseded any prior agreements related to Phase II and Phase III of the development project, and thus, plaintiffs were only entitled to liquidated damages for a breach of the 1996 Excavation Contract. First, as we discussed *supra*, the plain language of the default remedy provision only applied to the "Purchaser's" failure to exercise an option, and thus, the default remedy provision did not apply to a "non-monetary failure," or to any other agreement or breach.

We agree with the trial court's that the merger and integration clause superseded any prior agreements related to the excavation of Phase II and Phase III. *UAW-GM Human Resource Center, supra,* 228 Mich App 495-496. The 1997 Option Agreement provided, in pertinent part:

> 5. **Seller's Work**: Purchaser [Defendants] agrees to enter into an excavation contract with Seller [Plaintiffs] (or Seller's designee) for basement

> excavations, installation of sewer and water leads, backfill, rough and finish grading and trucking of soils for all Sites in the Condominium, subject to mutual agreement of Seller and Purchaser on pricing (which shall be competitive and customary for such work*)*.
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> 31. **Entire Agreement**: This Agreement and the Exhibits attached hereto embody the entire understanding between the parties hereto and supersede any prior agreements for *Phases 2 and 3*, understandings, and communications of any nature whatsoever. and [sic] there are no oral agreements existing between the parties relating to this transaction that are not expressly set forth herein. This Agreement may not be modified, except in a writing that is signed by all parties. [Emphasis added.]

"When the parties choose to include an integration clause, they clearly indicate that the written agreement is integrated . . . ." *UAW-GM Human Resource Center, supra*, 228 Mich App 495-496. The language here is clear, and "parole evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Id*., 492.

However, the merger and integration clause does not apply to the parties' subsequent signed agreements, which modified the 1997 Option Agreement. Specifically, the June 1, 1998, pricing structure to the Excavation Contract modified and clarified Paragraph 5 in the 1997 Option Agreement by providing (1) the identity of the subcontractor to do the work, (2) the pricing for the excavation work, and (3) the effective date. Therefore, we find that the trial court erred when it concluded that the merger and integration clause negated plaintiffs' claim regarding a breach of the excavation contract. *UAW-GM Human Resource Center*, *supra*, 228 Mich App 491-492.

We affirm the trial court's order granting summary disposition regarding Count I of plaintiffs' complaint. We reverse the trial court's order granting summary disposition on Count II and Count IV. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio